No. 87-628

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. BRANCH, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DIANE S. KILLORY
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Attorney
Federal Communications Commission
Washington, D.C. 20554

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission correctly concluded that the "equal time" requirement contained in Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a), is triggered when a candidate appears on-the-air in the course of his employment as a television news reporter.

2. Whether Section 315(a) violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 824 F.2d 37. The initial order of the Federal Communications Commission (Pet. App. 35a-44a) is reported at 101 F.C.C.2d 901. The order of the Federal Communications Commission on reconsideration (Pet. App. 33a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on July 21, 1987. The petition for a writ of certiorari was filed on October 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

1. Prior to 1959, Section 315(a) of the Communications Act of 1934, 47 U.S.C. (1958 ed.) 315(a), provided

that whenever a television or radio broadcast station permitted "a legally qualified candidate for any public office" to "use" the station, it was required to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." This statutory provision is often referred to as the "equal time" requirement.

The Federal Communications Commission initially concluded that when a candidate's appearance on a station was the result of "a routine news broadcast" in which the candidate was the subject of the news, the appearance was not a "use" of the station within the meaning of Section 315 and, therefore, did not require the station to provide equal time to opposing candidates. *Use of Broadcast Facilities by Candidates for Public Office*, 23 Fed. Reg. 7817, 7817-7818 (1958); *Allen H. Blondy*, 40 F.C.C. 284, 285 (1957). The Commission further concluded that when the candidate was a station employee who appeared during a newscast as a reporter rather than as the subject of the newscast, the appearance was a "use" of the station and, therefore, did give rise to the equal time obligation. *Use of Broadcast Facilities by Candidates for Public Office*, 23 Fed. Reg. 7818 (1958); *Kenneth E. Spengler*, 40 F.C.C. 279 (1956); see also *KUGN*, 40 F.C.C. 293 (1958); *KTTV*, 40 F.C.C. 282 (1957).

The Commission changed its interpretation of Section 315(a) in 1959, concluding that any appearance by a candidate on a newscast constituted a "use" of the station creating equal time obligations. See *CBS, Inc. (Lar Daly)*, 18 Rad. Reg. (P&F) 238 (Feb. 19, 1959), reconsid. denied, 26 F.C.C. 715 (1959). Congress quickly acted to set aside the FCC's new statutory interpretation. It amended the statute by adding a sentence to Section 315(a) stating that "[a]ppearance by a legally qualified candidate on any (1) bona fide newscast, (2) bona fide news interview, (3) bona

fide news documentary * * *, or (4) on-the-spot coverage of bona fide news events * * *, shall not be deemed to be a use of a broadcasting station within the meaning of this subsection." Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557. The legislative history of this amendment makes clear that its purpose was to overrule the *Lar Daly* decision. See, *e.g.*, S. Rep. 562, 86th Cong., 1st Sess. 2-10 (1959); H.R. Rep. 802, 86th Cong., 1st Sess. 2-4 (1959).

2. Petitioner was an employee of television station KOVR in Sacramento, California, during the period relevant to this litigation. He worked as a news reporter and made regular appearances in that capacity on the station's daily news programs. In 1984, petitioner decided to seek election to the town council in the nearby community of Loomis, California. Upon being informed of petitioner's planned candidacy, the management of KOVR advised petitioner that, because of the equal time obligations that Section 315(a) might impose upon the station in the event petitioner continued to appear on the air, petitioner would be required to take an unpaid leave of absence during his candidacy.[1]

Petitioner chose not to pursue his candidacy. He instead petitioned the Commission for a declaratory ruling that the exemptions set forth in Section 315(a) encompass candidate appearances during newscasts even when the candidate appears as a newscaster. Petitioner argued that a contrary interpretation of the statute would violate the First Amendment.

The Commission denied the petition (Pet. App. 35a-44a). The Commission observed that it previously had concluded that "a candidate's appearance 'on a news-type

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[1] It was estimated that the station might otherwise be required to make as much as 33 hours of response time available to all of petitioner's opponents. See Pet. App. 3a & n.1.

program in which he has participated in "the format and production" ' would be subject to [Section 315(a)'s] 'equal opportunities' " requirement. *Id.* at 40a (quoting *Use of Station by Newscaster Candidate for Public Office*, 40 F.C.C. 433, 434 (1965)). It stated that "[a] news reporter, by the very nature of his position, may initiate and control his on-the-air appearances and is not the subject of the news program. These are precisely the types of activities that Congress identified as being inappropriate for a candidate to participate in when performed in conjunction with his appearance on an exempt program" (Pet. App. 43a). The Commission stated that to conclude that a news reporter's appearances fell within the statutory exemption "would be inconsistent with Congress' basic objective for enacting Section 315—to prevent a legally qualified candidate from gaining an advantage over an opponent through favoritism or gaining access to a broadcast facility" (*id.* at 44a).

The Commission rejected petitioner's claim that the Commission's interpretation of Section 315 was unconstitutional because it interfered with "the ability of broadcasters to exercise their journalistic freedoms" (Pet. App. 40a). The Commission observed that "Congress has determined in enacting Section 315 that there is a governmental interest in assuring that licensees afford equitable treatment to all candidates running for a particular office, and that this interest justifies imposing certain limitations on broadcast speech" (*id.* at 41a). It further stated that "Section 315 does not discriminate against [petitioner] and those individuals similarly situated because all candidates for public office are treated in the same manner" (*ibid.*).

The Commission declined to address petitioner's general challenge to the constitutionality of Section 315. The Commission observed that "[t]his is not * * * a proceeding in which there is a well developed record on the constitu-

tional balancing involved in evaluating Section 315" and that "such constitutional decisions have 'generally been thought beyond the jurisdiction[ ] of administrative agencies' " (Pet. App. 40a n.4 (citation omitted)). The Commission therefore "decline[d] to undertake a review * * * of previous determinations as to the constitutionality of Section 315" (*ibid.*).

3. The court of appeals unanimously affirmed the Commission's determination (Pet. App. 1a-31a). The court first observed that as the statute stood prior to the 1959 amendment, on-the-air work by a reporter was classified as a "use" of the broadcast station triggering the equal time obligation (Pet. App. 8a-10a). The court of appeals found that "[t]he legislative history of the 1959 amendments conclusively establishes three critical and overlapping points. First, Congress' central concern in taking action was to overrule the Commission's *Lar Daly* decision" (Pet. App. 11a). Second, "the purpose of overruling *Lar Daly* was to restore the understanding of the law that had prevailed previously. * * * That understanding * * * required 'equal opportunities' whenever any candidate appeared on the air, unless the candidate was the subject of 'a routine news broadcast' " (*id.* at 12a-13a). Third, "Congress objected to the imposition of 'equal opportunities' obligations on any station that carried news coverage of a candidate, because it deterred the broadcast media from providing the public with full coverage of political news events" (*id.* at 13a-14a).

The court found that the language of the statutory exemptions reflects these purposes. The " '[a]ppearance by a legally qualified candidate,' which is not 'deemed to be use of a broadcasting station,' is coverage of the candidate that is presented to the public as news. * * * 'By modifying all four categories [not deemed to be "use" with the phrase "bona fide"], Congress plainly emphasized its reliance on

newsworthiness as the basis for an exemption' " (Pet. App. 15a (citation omitted)). The court explained that "[w]hen a broadcaster's employees are sent out to cover a news story involving other persons, * * * the 'bona fide news event' is the activity engaged in by those other persons, not the work done by the employees covering the event. * * * For example, when a broadcaster's employees are sent out to cover a fire, the fire is the 'bona fide news' event and the reporter does not become a part of that event merely by reporting it" (*id.* at 16a).

The court found that "[t]his reading of the statute as not exempting newscasters is also compelled by the weight of the legislative history" (Pet. App. 16a). Congress's intent was to return to the pre-*Lar Daly* interpretation of the statute, and "[t]he status quo before *Lar Daly* allowed a candidate to appear on the air as the *subject* of 'routine' news coverage without triggering the 'equal opportunities' rule, but did not exempt appearances by a candidate who is 'regularly employed as a station announcer' " (*id.* at 16a-17a (emphasis in original; citation omitted)). The court stated that "[n]owhere in the legislative history is there the slightest indication that Congress intended, for the first time, to sweep the latter class of appearances within the scope of the exemption" (*id.* at 17a).

The court also noted that Congress expressed considerable concern about the possibility that "sham" news events staged by a candidate might be found to be exempt from the equal time obligation; it resolved this problem by limiting the exemption to "bona fide" events. "In denying any exemption for candidate appearances through 'sham' news events, Congress once again expressed its view that exemption should be made only for on-air appearances that are intrinsically newsworthy." Pet. App. 17a-18a.

That purpose is furthered by the Commission's interpretation of the statute.[2]

The court of appeals rejected petitioner's claim that Section 315(a) violates the First Amendment (Pet. App. 24a-26a). Petitioner relied upon *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), in which this Court invalidated a statute regulating the content of newspapers. The court of appeals observed that this Court "has expressly held * * * that the first amendment's protections for the press do not apply as powerfully to the broadcast media" (Pet. App. 24a, citing *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969)). It concluded that "[w]hile doubts have been expressed that the scarcity rationale [underlying *Red Lion*] is adequate to support differing degrees of first amendment protection for the print and electronic media, it remains true, nonetheless, that [petitioner's] first amendment challenge is squarely foreclosed by *Red Lion*" (Pet. App. 24a (citations omitted)).[3]

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[2] Judge Starr stated that "a more natural statutory interpretation would exempt newscast reporters who are just doing their jobs from the 'equal opportunities' requirement of section 315(a)" (Pet. App. 30a (Starr, J., concurring)). He found that Congress's intent was ambiguous, however, and upheld the Commission's order on the ground that its interpretation of the statute was reasonable (*id.* at 31a).

[3] The court of appeals rejected petitioner's invitation to "step[] away" from *Red Lion*, noting that this Court had "recently reaffirmed *Red Lion* and disavowed any intention 'to reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.' " Pet. App. 25a (quoting *FCC* v. *League of Women Voters*, 468 U.S. 364, 377 n.11 (1984)). The court of appeals observed that "[t]he Commission may now have sent just such a signal" in its report on the fairness doctrine (Pet. App. 25a-26a, citing *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985)).

The court of appeals rejected petitioner's contention that the Commission's interpretation of the statute impermissibly burdened his

ARGUMENT

1. a. Petitioner contends (Pet. 7-13) that the Commission and the court of appeals erred by concluding that petitioner's appearances on television as a news reporter would trigger the equal time obligation set forth in Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a).

The court of appeals correctly recognized that petitioner's claim rests upon the meaning of the language added to Section 315(a) by the 1959 amendment (see Pet. App. 8a-10a). Before the statute was amended, the appearance of a candidate on a news broadcast in his capacity as a reporter plainly triggered the equal time obligation. The statute then provided that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcast station." And the Commission had concluded that the appearance of a candidate as a reporter rather than as the subject of a news broadcast gave rise to the equal time obligation. *Use of Broadcast*

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right to run for office because he could not both retain his job and run for office (Pet. App. 21a-23a). The court stated that " '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.' " *Id.* at 22a (quoting *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972)). The court observed that "nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice," observing that this Court has upheld several statutes requiring prospective candidates to choose between retaining their jobs and running for office (Pet. App. 22a-23a). The court concluded that "the burdens imposed by section 315 [are] justifiable as 'both reasonable and necessary to achieve the important and legitimate objectives of encouraging political discussion and preventing unfair and unequal use of the broadcast media' " (*id.* at 23a (citation omitted)).

Facilities by Candidates for Public Office, 23 Fed. Reg. 7817 (1958); see also page 2, *supra*.

The portion of Section 315(a) added by the 1959 amendment provides in pertinent part:

> Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

The court of appeals correctly concluded (Pet. App. 15a-16a) that this language does not provide an unambiguous answer to the question whether the appearance of a candidate as a news reporter constitutes a use of the broadcast station triggering the equal time obligation.

The first two exemptions set forth in the 1959 amendment, viewed in isolation, would appear to exempt a candidate's appearances as a news reporter from the equal time obligation. The third exemption "relates the candidate's appearance [on a news documentary] to the subjects covered in the program. If the candidate's appearance has nothing to do with the subjects that are being covered as news—whether because the candidate is a regular employee on all such [documentary] programs or, to take another example, because the candidate is being offered a gratuitous appearance that realistically is unrelated to the news content of the program—then the exemption does not apply" (Pet. App. 16a). Under the

third exemption's plain language, therefore, a candidate's appearance on a documentary program in his capacity as a news reporter would not be exempt from the equal time requirement.

The fourth exemption similarly does not seem to encompass the appearance of a candidate acting as a news reporter. As the court of appeals explained (Pet. App. 16a), "[w]hen a broadcaster's employees are sent out to cover a news story involving other persons, * * * the 'bona fide news event' is the activity engaged in by those other persons, not the work done by the employees covering the event. * * * For example, when a broadcaster's employees are sent out to cover a fire, the fire is the 'bona fide news' event and the reporter does not become a part of that event merely by reporting it."

Congress surely did not intend the application of the equal time provision to a reporter/candidate's broadcast appearances to vary depending upon the type of news broadcast upon which the reporter appears. In view of the statute's ambiguity, it is necessary to look to the legislative history to ascertain Congress's intent with respect to that question. See also *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive"); *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 16 (1976). Review of the legislative history establishes beyond any doubt that Congress intended appearances by a candidate in his capacity as a news reporter to be subject to the equal time requirement. As the court of appeals stated, "[t]he weight of the legislative history [supporting that conclusion] * * * is overwhelming" (Pet. App. 20a).

First, as the court of appeals found, Congress's "central concern" in adopting the 1959 amendment was to overrule the Commission's decision in *CBS, Inc. (Lar Daly)*, 18

Rad. Reg. (P&F) 238 (Feb. 19, 1959), reconsid. denied, 26 F.C.C. 715 (1959). The Commission in that decision rejected its prior determination that an appearance by a candidate as the subject of a news broadcast did not constitute a "use" of a broadcast station within the meaning of Section 315(a); the Commission held that any appearance by a candidate on a newscast constituted a "use" of the station creating an equal time obligation. The legislative history makes clear that the *Lar Daly* decision was the principal impetus for congressional action in 1959. See, *e.g.*, S. Rep. 562, 86th Cong., 1st Sess. 2-10 (1959); H.R. Rep. 802, 86th Cong., 1st Sess. 2-4 (1959); see also Pet. App. 11a-12a & n.6 (collecting congressional references to *Lar Daly*).

Congress's purpose in overruling *Lar Daly* "was to restore the understanding of the law that had prevailed previously." Pet. App. 12a; see also S. Rep. 562, *supra,* at 2-3, 17-19; H.R. Rep. 802, *supra,* at 2-3. That understanding "allowed a candidate to appear on the air as the *subject* of 'routine' news coverage without triggering the 'equal opportunities' rule, but did not exempt appearances by a candidate who is 'regularly employed as a station announcer.' Nowhere in the legislative history is there the slightest indication that Congress intended, for the first time, to sweep the latter class of appearances within the scope of the exemption" (Pet. App. 17a (emphasis in original; citations omitted)).[4]

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[4] The court of appeals observed that "Congress objected to the imposition of 'equal opportunities' obligations on any station that carried news coverage of a candidate, because it deterred the broadcast media from providing the public with full coverage of political news events, and many other news events as well" (Pet. App. 13a-14a). Thus, "[t]o the extent that Congress may have done more than reverse *Lar Daly*, by exempting broadcast coverage of news interviews and news documentaries in addition to newscasts and on-the-spot coverage of news events, it did so to protect a station's ability to exercise broad

Second, Congress emphasized that candidates' appearances on news programs were exempt from the equal time rule because those appearances were under the control of the broadcast station rather than the candidate. S. Rep. 562, *supra,* at 11; 105 Cong. Rec. 16225 (1959) (remarks of Rep. Brown) (the candidate "cannot put on a program of his own to help his own candidacy. Instead, it must be newsworthy, but it must be instigated by the station or by the news reporters that interview him"); *id.* at 14446 (remarks of Sen. Pastore). As the Commission found, "[a] news reporter, by the very nature of his position, may initiate and control his on-the-air appearances and is not the subject of the news program" (Pet. App. 43a). Congress's reliance upon the independent news judgment of the station and its employees as a means of

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discretion in choosing which *newsworthy events* to present to the public" (*id.* at 14a (emphasis in original)). The court of appeals correctly concluded that this congressional purpose is fully served by exempting appearances by a candidate as the subject of news coverage from the equal time obligation and does not weigh in favor of extending the exemption to appearances by a candidate in his capacity as a news reporter; "[i]t is irrelevant to [Congress's concern for protecting a station's discretion to select the newsworthy events it wants to cover] whether a station has broad discretion to determine which of its employees will actually present the news on the air" (*id.* at 17a).

Accordingly, there is no basis for petitioner's suggestion (Pet. 12-13) that the decision below conflicts with the same court of appeals' previous decision in *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976), which upheld the Commission's determination that candidate debates are exempt from the equal time obligation under the 1959 amendment even though debates were not exempt prior to the decision in *Lar Daly*. As the court of appeals here explained, *Chisholm* is justified by "Congress' intent to ensure that the public will have access to a broad array of newsworthy events"; that policy does not support an exemption for a newscaster/candidate when he appears on the air in his capacity as a newscaster. Pet. App. 18a n.11.

preventing candidates from manipulating the exemption to gain television exposure therefore weighs strongly in favor of excluding from the exemption a candidate's appearances in his capacity as a news reporter.

Third, Congress expressed considerable concern about "the possibility that 'sham' news events—events that are not bona fide news but are staged by the candidate—might be seen as exempt from the 'equal opportunities' rule" (Pet. App. 17a). By limiting the exemption to "bona fide" news events, "Congress * * * expressed its view that exemption should be made only for on-air appearances that are intrinsically newsworthy. At all times, the focus was not on preserving anyone's 'right' to appear on the air, but on preserving broadcasters' ability to present certain kinds of news programs and news events" (*id.* at 17a-18a (footnote omitted)). Since a candidate's appearances on the air as a news reporter are not intrinsically newsworthy, they do not fall within the exemption.

Fourth, Congress's basic objective in enacting Section 315(a) was "to prevent a legally qualified candidate from gaining an advantage over an opponent through favoritism or gaining access to a broadcast facility." Pet. App. 44a, citing S. Rep. 562, *supra,* at 8-9; *Paulsen* v. *FCC,* 491 F.2d 887 (9th Cir. 1974). Exempting a candidate/news reporter's on-the-air appearances from the equal time obligation would plainly give that candidate much greater television exposure than his opponents and, therefore, a considerable advantage over his opponents. For that reason, the exemption does not extend to such appearances.[5]

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[5] In addition, exempting a candidate/news reporter's appearances would "raise a station's news employees to an elevated status not shared by any of its other employees: although the work done on the air by any other employee on any other program would not be exempt,

Finally, the Commission's conclusion that the exemption does not extend to appearances by a candidate in his capacity as a news reporter should be upheld because it is reasonable. *NLRB* v. *United Food & Commercial Workers Union, Local 23,* No. 86-594 (Dec. 14, 1987), slip op. 10; *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 842-844 (1984). In view of the ambiguity of the statutory language and the strong support for the Commission's view in the legislative history, the Commission's interpretation of the statute that it is charged with administering should be upheld. See Pet. App. 31a (Starr, J., concurring).[6]

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the work done on the air by news employees would be. Yet this novel division was never endorsed, or even discussed, by Congress" (Pet. App. 18a (citation omitted)).

[6] The Commission has not always adhered to the interpretation of the statute that it applied in the present case. In *KWTX,* 40 F.C.C. 304, aff'd *sub nom. Brigham* v. *FCC,* 276 F.2d 828 (5th Cir. 1960) (per curiam), the Commission concluded that the equal time obligation did not extend to on-the-air appearances by a weatherman who was a candidate for office. Five years later, the Commission again addressed this issue, stating that it had "re-examined the question of the applicability [in the newscaster/candidate context] of the 1959 amendment, and * * * researched at length the legal and legislative history considerations." *Use of Station by Newscaster Candidate for Public Office,* 40 F.C.C. 433, 434 (1965). Based upon that detailed consideration of the issue, the Commission reversed its position, concluding that the 1959 amendment did not exempt from the equal time rule the appearance of a newscaster/candidate in his capacity as a newscaster. The Commission has adhered to that position since 1965.

This Court has observed that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view" (*INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 25 n.30 (citation omitted)). The Court applied that principle in *Cardoza-Fonseca* on the basis of its conclusion that the agency had exhibited "a long pattern of erratic treatment" of the question of statutory interpretation presented in that case (*id.* at 25-26 n.30). Here, where the Commission "changed its position upon fuller con-

b. Petitioner argues (Pet. 7-9) that the decision below conflicts with *Brigham* v. *FCC*, 276 F.2d 828 (5th Cir. 1960) (per curiam). The court of appeals in *Brigham* reviewed the Commission's decision in *KWTX*, 40 F.C.C. 304 (1960), holding that the equal time obligation of Section 315(a) was not triggered by the appearance on the air of a weatherman (who was also a candidate for public office) when he appeared in his capacity as a weatherman. The Commission relied upon the exemption for "bona fide newscasts" contained in the 1959 amendment to the statute (40 F.C.C. at 305). The court of appeals upheld the Commission's determination in a brief decision, limiting its discussion of the statutory question to a brief paragraph that did not discuss the relevant legislative history (see 276 F.2d at 830).

As a threshold matter, it is far from clear that there is a square conflict between *Brigham* and the present case. The court of appeals in *Brigham* did not set out the reasons for its decision to uphold the Commission's interpretation of the statute; that decision might well have rested upon deference to the Commission's interpretation. And the conclusion that the Commission's former interpretation of the statute was reasonable does not necessarily conflict with a decision upholding the Commission's later, contrary interpretation of the statute. Pet. App. 31a (Starr, J., concurring) (noting that both readings of the statute were reasonable and therefore both would be upheld on judicial review); see also *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 117 (1985) (White, J., concurring).

At all events, five years after rendering the decision reviewed in *Brigham*, the Commission reconsidered the

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sideration of the issue for a very good reason, and has faithfully adhered to its current position for more than twenty years" (Pet. App. 20a), there is no basis for discounting the Commission's interpretation of the statute (*id.* at 31a (Starr, J., concurring) (deferring to the Commission's interpretation of Section 315(a))).

question on the basis of a full reexamination of the statutory language and legislative history. It concluded that its prior interpretation had been in error, and that the equal time obligation is triggered by a candidate's appearance in his capacity as a newscaster. *Use of Station by Newscaster Candidate for Public Office,* 40 F.C.C. 433 (1965). Since the Commission applies its own interpretation of the statute in its administrative proceedings, the question that would be presented to the Fifth Circuit on a future petition for review would be whether the Commission's current interpretation of the statute should be upheld. In view of the quite different posture in which *Brigham* was decided, the wholly conclusory nature of the decision in *Brigham,* and the comprehensive analysis of the statutory language and legislative history set forth in the decision below, we think it unlikely that the Fifth Circuit would adhere to the interpretation of the statute adopted in *Brigham* without first reconsidering the matter. Accordingly, unless and until the Fifth Circuit reaffirms *Brigham,* there is no conflict among the courts of appeals necessitating this Court's intervention.[7]

2. Petitioner also contends (Pet. 13-19) that Section 315(a) violates the First Amendment. For reasons we shall explain, we submit that this case does not present an appropriate occasion for consideration by this Court of that constitutional claim.

a. In *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), the Court concluded that the First Amendment permitted government regulation of the content of radio and television broadcasts that would be unconstitutional in other contexts: "[b]ecause of the scarcity of radio fre-

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[7] Moreover, the question presented here is of limited practical importance. Petitioner himself acknowledges (Pet. 8 n.8) that this is the first case in which the issue has arisen in more than 20 years.

quencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. * * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (*id.* at 390).

The Court recently reaffirmed the applicability of the *Red Lion* standard to First Amendment challenges to government regulation of broadcast media. See *FCC* v. *League of Women Voters,* 468 U.S. 364, 376 (1984). The Court appended the following footnote to that reaffirmation (*id.* at 376-377 n.11 (citation omitted)):

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

Petitioner appears to acknowledge that Section 315 satisfies the constitutional standard set forth in *Red Lion* and its progeny.[8] He asserts instead that recent FCC decisions concerning the state of competition in the broadcast industry constitute the signal to which the Court referred in *League of Women Voters* and that the Court should grant certiorari in the present case to consider whether it is now appropriate to revise the *Red Lion* standard.

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[8] That proposition would appear to be beyond dispute because the Court in *Red Lion* affirmed the constitutionality of Section 315. See 395 U.S. at 391.

The Commission recently issued a comprehensive study of the fairness doctrine. See *General Fairness Doctrine Obligations of Broadcast Licensees,* 102 F.C.C.2d 143 (1985) [hereinafter *Fairness Doctrine Report*].[9] In one portion of its report, the Commission considered the continuing need for the doctrine "in light of the increase in the amount and type of information sources in the marketplace" (see *id.* at 196). The Commission concluded that "the growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary. Moreover, we find that the dynamics of the information services marketplace overall insures that the public will be sufficiently exposed to controversial issues of public importance." *Id.* at 197 (footnote omitted); see also *id.* at 208-218 (discussing state of competition among different types of media).

The Commission concluded its fairness doctrine report by finding that the doctrine is constitutionally "suspect" and that the doctrine disserves the public interest because "[i]nstead of furthering the discussion of public issues, [it] * * * inhibits broadcasters from presenting controversial issues of public importance." *Fairness Doctrine Report*, 102 F.C.C.2d at 156, 187, 225. The Commission declined to take any action on the basis of this conclusion, explaining that, because of strong congressional interest in the matter, "it would be inappropriate at this time for us to

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[9] The fairness doctrine imposes two separate obligations upon a broadcast licensee: the licensee must (1) provide coverage of controversial issues of public importance in the communities that it serves, and (2) provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See 47 C.F.R. 73.1910; *Columbia Broadcasting System* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 110-111 (1973); *Red Lion Broadcasting Co.*, 395 U.S. at 377-378.

either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding" (*id.* at 148). Subsequently, in *Meredith Corp.* v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987), a case in which the Commission had imposed a penalty on the basis of a violation of the fairness doctrine, the court of appeals remanded the matter to the Commission with directions to consider the broadcaster's constitutional challenges to the enforcement of the doctrine unless the Commission concluded that "in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest" (*id.* at 874).

Following the solicitation of public comments, the Commission issued a decision pursuant to the court of appeals' remand, concluding that it would no longer enforce the fairness doctrine because "the doctrine contravenes the first amendment and thereby disserves the public interest" (*Syracuse Peace Council* v. *Television Station WTVH*, 2 F.C.C. Rec. 5043 (1987)). The Commission first evaluated the doctrine under the *Red Lion* standard and found that "[b]ecause the net effect of the fairness doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively disserves the First Amendment interests of the public" and therefore fails to pass constitutional muster under the *Red Lion* standard (*id.* at 5052).

The Commission went on to suggest (2 F.C.C. Rec. at 5053 (footnote omitted)) that *Red Lion* no longer set the appropriate constitutional framework for the evaluation of First Amendment claims in the broadcast media context:

> We believe that the *1985 Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the signal referred to in *League of Women Voters*. It also provides the

> basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters,* we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.

The Commission concluded that the fairness doctrine could not pass muster under that constitutional standard.

b. We agree with petitioner that the Commission's decision in *Syracuse Peace Council* provides the "signal" of a change in the media environment to which this Court referred in *League of Women Voters.* However, we disagree with petitioner's contention that the *Red Lion* standard should be reconsidered in this case.[10]

The factual findings that underlie the Commission's "signal" that reconsideration of *Red Lion* is appropriate are not a part of the record in this case. Those findings, which were made in the context of the Commission's assessment of the constitutionality of the fairness doctrine, are now pending on petitions for review in the

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[10] We express no opinion at this time regarding the constitutionality of Section 315. Should the Court conclude, contrary to our submission, that this is an appropriate case in which to reconsider the *Red Lion* standard, we will address that question in our brief on the merits. We note that neither the United States nor the Federal Communications Commission took a position regarding the constitutionality of Section 315 in the court below. See FCC C.A. Br. 19-20.

United States Court of Appeals for the District of Columbia Circuit.[11] This Court recognized first in *Red Lion* and more recently in *League of Women Voters* that facts regarding the broadcast industry are central to the First Amendment inquiry; for that reason, we submit that the Court should defer consideration of the constitutional issue raised by petitioner until the case in which the findings were made, and in which those findings are currently under appellate review, becomes ripe for this Court's consideration.

That course of action will have the additional benefit of permitting the Court to address this important constitutional question in a context—unlike the present one—in which the Commission, in its *Fairness Doctrine Report* and the subsequent decision in *Syracuse Peace Council,* has developed a full factual record concerning both the nature of the challenged government regulation and the characteristics of the broadcast industry. Cf. *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986) (recognizing that a full factual record is likely to aid resolution of First Amendment issues in the cable television context).

To be sure, this Court may not be required to reach the question regarding the continued vitality of *Red Lion*'s constitutional holding in a future case arising out of the fairness doctrine proceeding.[12] But that possibility is not a

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[11] See *Syracuse Peace Council* v. *FCC*, No. 87-1516 (D.C. Cir.). The petitions for review of the *Fairness Doctrine Report* proceeding were dismissed as moot after the Commission issued its order in *Syracuse Peace Council*. See *Radio-Television News Directors Ass'n* v. *FCC*, No. 85-1691 (D.C. Cir. Sept. 23, 1987). Petitions for reconsideration in the *Syracuse Peace Council* proceeding are now pending before the Commission.

[12] The District of Columbia Circuit has concluded that the fairness doctrine is not required by statute. See *Telecommunications Research*

sufficient reason for the Court to consider the question here.[13] Indeed, because the Commission's order in the fairness doctrine case is now pending before the court of appeals on judicial review, consideration of the constitutional question by this Court in the present case would be premature. The court of appeals must review the Commission's factual determinations as well as its legal conclusions (see 5 U.S.C. 706). The possibility therefore remains that the Commission's order could be modified or vacated in whole or in part and that further factual development or analysis could occur in that case. Thus, we submit that the Court should not reconsider *Red Lion* on the basis of the Commission's findings until those findings have themselves been reviewed by the court of appeals.[14]

& Action Center v. *FCC*, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, No. 86-1371 (June 8, 1987). Should this Court agree with that conclusion, it need not directly confront the question of the constitutionality of the fairness doctrine. The sole issue would be whether the Commission's decision to eliminate the doctrine is "arbitrary, capricious, [or] an abuse of discretion" (5 U.S.C. 706(2)(A)). However, the Commission concluded that "the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the doctrine"; it therefore decided to "address the policy and constitutional issues together" (*Syracuse Peace Council*, 2 F.C.C. Rec. at 5046 (footnotes omitted)). For that reason, the Court would likely address important aspects of the constitutional question in the course of reviewing the Commission's administrative determination.

[13] Indeed, the present case also presents a statutory question (discussed in point 1, *supra*) that could obviate the need to reach the constitutional issue.

[14] The fact that petitions for reconsideration of the *Syracuse Peace Council* order are now pending before the Commission provides an additional reason for this Court to decline to act upon the Commission's "signal" at this juncture.

Moreover, this Court's deliberations on the First Amendment issue might well be assisted by the court of appeals' evaluation of the Commission's conclusions. In sum, this Court should await resolution of *Syracuse Peace Council* so as to avoid prematurely addressing this important First Amendment issue in the present case.

Finally, the Court need not consider the constitutional claim here out of any concern of fairness to petitioner. This is not a case in which a constitutional issue is presented to this Court for the first time; the Court addressed the claim raised by petitioner in its decision in *Red Lion*. We submit that where a litigant urges this Court to reconsider existing constitutional doctrine, the Court is well advised to exercise considerable discretion in staying its hand until it is presented with the case that best illuminates the question presented for decision.

That is especially so where, as here, petitioner has not suffered any sanction such as a prison sentence or a fine. All that has happened is that he has not obtained the declaratory relief he had sought. Indeed, petitioner will be able to gain the benefit of any reconsideration of *Red Lion* by filing a new petition for a declaratory order if the Court subsequently alters the relevant constitutional standard.

For all of these reasons, we urge the Court to decline to consider in this case the constitutional question presented by petitioner.[15]

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[15] Petitioner also asserts (Pet. 19 n.22) that Section 315 violates the First Amendment because it "condition[s] his right to run for elective office on his willingness to sacrifice his career as a broadcast journalist," although he does not appear to present that question for review by this Court. Compare Pet. i. In any event, the court of appeals properly rejected this claim (see Pet. App. 21a-23a), and that determination accords with the decision of another court of appeals rejecting a similar claim (see *Paulsen* v. *FCC*, 491 F.2d 887 (9th Cir. 1974)). There is accordingly no reason for review of that claim by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DIANE S. KILLORY
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Attorney
Federal Communications Commission

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